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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-1096

LOCAL UNION No. 81 a/w Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO
Petitioner,

v.

ALLIED EMPLOYERS, INC.; SAFEWAY STORES, INC., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; NATIONAL LABOR RELATIONS BOARD; STATE OF WASHINGTON, HUMAN RIGHTS COMMISSION; CITY OF SEATTLE, OFFICE OF WOMEN'S RIGHTS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, The City of Seattle, Office of Women's Rights (hereinafter "Office of Women's Rights") submits this brief in opposition to the petition of Local Union No. 81 a/w Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether a court of appeals is authorized to affirm a district court judgment by action of a division consisting of less than three judges.

2. Whether a court of appeals is required to transmit a suggestion of rehearing en banc to the judges of the court who are in regular active service.

3. Whether a federal district court has jurisdiction pursuant to Section 301 of the National Labor Relations Act (29 U.S.C. Sec. 185) to rule on the validity of a labor contract in a suit for declaratory judgment filed by a labor union against the employers and federal, state and local civil rights agencies where there is no actual controversy between any of the parties to the suit.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those statutes and rules cited by Petitioner in its brief, all three questions require consideration of Rule 19, Revised Rules of the Supreme Court of the United States. The third question also requires consideration of Seattle Ordinance 102562, Section 5, as amended by Seattle Ordinance 103422, Section 4, in addition to 29 U.S.C. Section 185, 28 U.S.C. Section 2201, and Article III, Section 2, United States Constitution. The relevant statutes, rules and constitutional provisions involved are set forth at pages A-1-A-7, *infra*.

STATEMENT OF THE CASE

This Respondent, The City of Seattle, Office of Women's Rights, does not take issue with the facts recited in Petitioner's Statement of the Case. In addition to those facts recited, however, it is important to note that, although a "Directors Charge (R. 42)", a complaint stating various allegations, has been filed by Respondent Office of Women's Rights, no findings of fact whatsoever have been made

regarding the charge and no finding has been made that an unfair practice has been or is being committed by Petitioner. Such findings are required by Seattle Ordinance 102562, Section 5(C), as amended by Seattle Ordinance 103422, Section 4 (*infra*, p. A-5) before any administrative action can be taken against Petitioner and before any actual controversy can arise between this Respondent and Petitioner.

ARGUMENT

I. Respondent Office of Women's Rights, without waiver of any right to present argument in future proceedings, presently takes no position on the two questions regarding procedural requirements in the Court of Appeals for the Ninth Circuit. Those questions do not relate to the primary, and overriding, issue of jurisdiction herein. This Respondent would only submit that, in view of the lack of jurisdiction herein, there are no "special and important reasons" for granting a writ of certiorari based upon procedural considerations. (Supreme Court Rule 19, *infra*, p. A-2).

II. Petitioner asserts federal subject matter jurisdiction under Section 301 of the National Labor Relations Act (29 U.S.C. Sec. 185a). However, both Article III of the United States Constitution, *infra*, p. A-1, and 28 U.S.C. Sec. 2201, Declaratory Judgment Act, require the existence of an actual controversy between the parties. For purposes of determining jurisdiction under Section 301, the parties in question are those parties to the contract in dispute: Petitioner and Respondents Allied Employers and Safeway. (None of the various agencies named as defendant-respondents had or have any direct relationship with the labor agreement in question.) The threshold issue then is

whether as between Petitioner and the employers, an actual case or controversy exists. None of these parties can readily assert the invalidity of a contract negotiated by them and for which they are potentially liable to the employees affected thereby; no party to the agreement who is also a party here, occupies the necessary adverse position contemplated by the Constitution and the Declaratory Judgment Act.

Reliance upon Section 301 of the National Labor Relations Act (29 U.S.C. Sec. 185(a)) as the foundation of Petitioner's claim of federal court subject matter jurisdiction is misplaced. Section 301(a) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U.S.C. Sec. 185(a)).

It should be clear that the intent of that language was to allow for access to the federal courts when a party to the contract feels there has been a breach of some clause in the contract. The Petitioner is not claiming any violation of the negotiated contract between itself and respondent-employers. Its claim is based on potential duplications of federal, state, and local administrative proceedings.

Petitioner has conceded in its brief (Pet. Br. p. 11) that no case or controversy exists as to Respondent NLRB or Respondent Washington State Human Rights Commission. Respondent Office of Women's Rights has filed a complaint against Petitioner; however, it does not present a threat to

Petitioner. The only action the Office of Women's Rights has taken regarding this complaint is to notify Petitioner of its existence and to serve interrogatories relating to the allegations therein. Petitioner declined to answer the interrogatories and the Office of Women's Rights has taken no further action whatsoever.

It is possible that had the Office of Women's Rights pursued this investigation, there would have been a finding of "no reasonable cause" for the complaint. However, no investigation has commenced and if it does Petitioner may raise any defenses or issues during the course of the administrative proceedings. It is also possible that a conciliation agreement could be reached between Petitioner and the Office of Women's Rights, thereby concluding the matter far short of any formal administrative hearing action (Seattle Ordinance 102562, Section 5(C), (D), and (E), as amended, *infra*, p. A-5). Such a pre-investigation situation has been considered in Moore's *Federal Practice* in regard to standing to sue:

> ". . . The question as to whether the mere threat of enforcement by the agency confers such standing is akin to the question of whether a controversy exists between the plaintiff and defendant in cases in which pre-enforcement relief is sought against prosecution under an allegedly invalid statute. When the rule may or may not be enforced against the plaintiff, and the plaintiff is subjected to no detriment in the meanwhile, and any issues that he may wish to raise in connection with enforcement can be raised in the enforcement proceeding and will in due course reach the courts upon review, the plaintiff may not anticipate the controversy by seeking declaratory relief. . . ." (6A *Moore's Federal Practice*, Section 57.16, p. 57).

Petitioner's action in Federal District Court was premature, as it wished the court to pass upon the structural integrity of the contract before any of the parties took a definite position on that issue. The respondent-employers certainly were not challenging the structural integrity of the contract as they were one of the parties bound by it. The Office of Women's Rights had no position on the issue and no adverse interest is created by merely joining that office as a defendant.

Nor is a case or controversy created by use of the Declaratory Judgment Act (28 U.S.C. Sec. 2201), for:

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions. . . ." *Alabama Federation of Labor v. McAdory,* 325 U.S. 450 at 461, 89 L.Ed. 725 (1945).

Likewise:

> ". . . [T]he Declaratory Judgment Act is only procedural in its operation. It permits courts to grant relief only in cases within their jurisdiction, i.e., cases and controversies under Article III, § 2 of the Constitution of the United States. Thus, by the Act, Congress merely enlarged the remedies available in the federal courts but not the jurisdiction of the court itself." *Lumbermens Mutual Casualty Company v. Borden Company,* 241 F.Supp. 683 at 689 (1965).

Therefore, the requisite adversity of interests among the parties which will assure active participation because of immediate threat of injury to legal rights, is missing. See *Baird v. Bellotti,* 393 F.Supp. 847 (1975).

The decision of the Third Circuit in *Jersey Central Power v. IBEW*, 508 F.2d 687 (3d Cir. 1975), cert pending, docket 75-182, relied upon by Petitioner (Pet. Br. pp. 10-11) is distinguishable. The employer, Jersey Central, had separate and inconsistent contracts with the respondent unions and the respondent EEOC, both of which purported to control the procedure to be followed in lay-offs. The court accepted jurisdiction on the basis that the employer was bound by two inconsistent contracts, and the other two contracting parties had announced their intentions to require the employer to comply with their respective contracts. Jurisdiction over the EEOC in the *Jersey Central* case was predicated upon "arising under" jurisdiction based on 28 U.S.C. Sec. 1331, or alternatively ancillary jurisdiction given Section 301 jurisdiction over the unions and the employer. Adversity of the EEOC was not considered in the court's analysis of whether a justiciable controversy existed.

The *Jersey Central* case had matured to the point where the judicial function could be exercised in resolving an immediate and real dispute. The instant case does not approach maturity. In order for *Jersey Central* to be controlling here, one of the agencies would have to have at least made a finding or to have taken a clear position adverse to Petitioner's interest which would present a concrete issue for settlement. The Office of Women's Rights has certainly not adopted any position adverse to Petitioner and there is no evidence that the EEOC has taken any position whatsoever.

A decision by the Federal District Court on Petitioner's action would be merely advisory and would prevent the

Office of Women's Rights from following its investigative and administrative procedures. The anxiety of petitioner as to any imagined threat is not the type of genuine or real danger to a legal interest which the courts require for a case or controversy.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent
The City of Seattle
Office of Women's Rights

APPENDIX A

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, Section 2, Clause 1:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Declaratory Judgment Act, 28 U.S.C. Sec. 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

National Labor Relations Act, as amended, Section 301, 29 U.S.C. Sec. 185:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

United States Supreme Court Rule 19, 28 U.S.C.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

Seattle Ordinance 102562, Section 5, as amended by Seattle Ordinance 103422, Section 4:

"Section 5. ENFORCEMENT.

"(A) A complaint alleging an unfair employment practice shall be in writing and signed by the charging party, describing the unfair employment practice complained of and must be filed within six months of the occurrence of the alleged unfair employment practice by:

"(1) Any person, or the person's attorney, when the person claims to be aggrieved by an unfair employment practice.

"(2) Any Commission or Director as defined in Section 3 of this ordinance whenever any such Commission or Director has reason to believe that any person has been engaged or is engaging in an unfair employment practice.

"(3) A State or Federal agency concerned with discrimination in employment whenever any such agency has reason to believe that an unfair employment practice has been or is being committed.

"(4) Any labor organization which has reason to believe that an unfair employment practice has been or is being committed.

"Complaints pertaining solely to race, color, creed, religion, ancestry, national origin, or political ideology shall be filed with the Department of Human Rights which shall have primary enforcement responsibility with respect thereto; complaints pertaining solely to sex, marital status or sexual orientation shall be filed with the Office of Women's Rights which shall have primary enforcement responsibility with respect thereto; and complaints pertaining solely to age *or sensory, mental or physical handicaps* shall be filed with the *Department of Human Resources,* which shall have primary enforcement responsibility with respect thereto; provided that a complaint alleging more than one or a combination of such factors may be filed with the department or division having jurisdiction over any one of such factors. In such case the receiving Office, Division or Department shall, promptly and before investigation, notify any other Office, Division or Department wherein the complaint could have been filed that the complaint has been received and provide a copy thereof upon request.

"(B) A complaint shall not be rejected as insufficient because of failure to include all required information so long as it substantially satisfies the informational requirements necessary for processing. The charging party may amend a complaint in any respect before notice of hearing on the matter and thereafter may amend the complaint only with permission of the hearing examiner which permission shall be granted when justice will be served thereby and all parties are allowed time to prepare their case with respect to additional or expanded charges which they did not and could not have reasonably foreseen would be in issue at the hearing.

"(C) After the filing of a complaint, the Director or in case of joint enforcement responsibility, the Director of Human Rights, jointly with the Director of the Office of Women's Rights *and/or Director of the Department of Human Resources,* as the complaint requires, shall promptly refer for investigation and ascertainment of the facts. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or is not reasonable cause for believing that an unfair practice has been or is being committed.

"(D) If the finding is made that there is no reasonable cause, said finding shall be furnished to the charging party and to the respondent. Within thirty days after receipt of the finding, the charging party shall have the right to appeal such finding to the commission having hearing responsibility by filing a written statement of appeal with it. In the event that no appeal is taken or such appeal is unsuccessful, the complaint shall be dismissed.

"(E) If the finding is made initially or on appeal that reasonable cause exists to believe that an unfair employment practice has occurred, the Director shall endeavor to eliminate the unfair practice by conference, conciliation and persuasion which may include as a condition of settlement the elimination of the unfair employment practice, hiring, reinstatement or upgrading with or without back pay, admittance or restoration to membership in a labor organization, admittance to participation in a guidance apprentice-training or retraining program, or such other requirements as may lawfully be agreed upon by the parties, and the Director. Any settlement agreement shall be reduced to writing and signed by the respondent. An order shall then be entered by the Director setting forth the terms of the agreement. Copies of such order shall be delivered to all affected parties and the original thereof filed with the City Clerk. If no agreement can be reached, a finding to that effect shall be made and reduced to writing with a copy thereof furnished to the charging party and the respondent.

"(F) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of a finding to that effect, the complaint and any and all findings made, shall be certified by the Director to the appropriate Commission(s) for hearing. The Director shall then cause to be issued and served in the name of the Commission or Commissions having hearing responsibility written notice of hearing to all parties as provided by law.

"The hearing shall be conducted by a hearing examiner from the office of Hearing Examiner, if available, or otherwise by a hearing examiner appointed by the Director from staff, the Commission, or such other persons as the Director may find qualified. The hearing examiner shall conduct the hearing according to such rules as may be adopted therefor by the Director of Human Rights jointly with the Director of the Office of Women's Rights *and the Director of the Department of Human Resources,* consistent with this ordinance and the Seattle Administrative Code.

"The President of the Commission, or where joint enforcement responsibility is involved, the President of the Human Rights Commission jointly with the President of the Women's Commission, *Chairmen of the Mayor's Committee on Opportunities for the Handicapped,* and/or the President of the Technical Advisory Committee on Aging as the case requires, shall appoint a hearing panel of not more than three Commissioners or persons acting in the name of the Commission with the majority determined by the nature of the complaint, who shall represent the Commission(s) at the hearing.

"The final decision after hearing shall be made by the hearing panel, within 30 days after receipt of and upon full consideration of the report and recommendations of the hearing examiner, as provided in the Seattle Administrative Code.

"(G) In the event the hearing panel shall determine that respondent has been engaged in or is engaged in any unfair employment practice, the hearing panel

shall issue, in the name of the Commission, and cause to be served on the respondent an order setting forth its decision and reasons therefor and requiring the respondent to cease and desist from such unfair practice or practices and to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading with or without back pay, admit or restore to membership in a labor organization, admit to participation in a guidance, apprentice training or retraining program, or to take such other action as, in the judgment of the hearing panel will effectuate the purposes of this ordinance which may include a requirement for report on the matter of compliance.

"(H) In the event the respondent refuses or fails to comply with any order of a Director or hearing panel, the Director of the department having primary enforcement responsibility shall certify the case and the entire record of its proceedings to the Corporation Counsel, who shall invoke the aid of the appropriate court to secure enforcement or compliance with the order, or to impose a civil penalty as set forth in Section 6, or both; provided, that in any case in which the order is directed to the City, or to any department, division, board, or agency thereof, a copy of such order shall be transmitted to the Mayor who shall take appropriate action to secure compliance therewith.

"(I) The Department, the Office of Women's Right's *and the Department of Human Resources,* in the performance of their functions, may enlist the aid of all departments of the city government, and all said departments are hereby directed to fully cooperate therewith.

"(J) The Department of Human Rights, the Office of Women's Rights *and the Department of Human Resources,* in carrying out the specific duties imposed by this ordinance, may request the aid of the City Council through its proper committee in the conduct of any further investigation and enforcement."